(3)

No. 06-451

IN THE

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,

Petitioners,

v.

NETCO, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF OF PETITIONERS

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RULE 29.6 STATEMENT

Petitioners incorporate the Rule 29.6 disclosure statement in their petition for a writ of certiorari.

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ARGUMENT

The petition demonstrated that the same question presented here is before the Court in another case decided by the Supreme Court of Missouri, *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006) (hereinafter "*Nitro*"). A reply brief in support of the petition for a writ of certiorari (no. 06-446) in *Nitro* is being filed concurrently. Because *Nitro* is the lead case, petitioners incorporate the arguments set forth in the *Nitro* reply brief.

As explained in the petition, the question presented here (as in *Nitro*) arises from the irreconcilable conflict between the Supreme Court of Missouri's decision and the "overwhelming majority" (Opp. at 14) of federal circuit courts holding that the incorporation by reference of nationwide arbitration rules, adopted by the American Arbitration Association and similar well-respected arbitration organizations, providing that the arbitrator decide issues of arbitrability constitutes "clear and unmistakable" evidence of the parties' agreement to arbitrate arbitrability under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In opposing the petition, respondents' brief is most notable for what it does not contest:

1. Respondents do not contest that the Supreme Court of Missouri in its decision below designated *Nitro* as a "companion case involving most of the same issues." (Pet. App. 1a.) Nor do they dispute that the issues in this case substantially overlap with those in *Nitro*. As a result, there is no dispute that, if certiorari is granted in *Nitro*, it also should be granted here.

2. Respondents do not contest that the Supreme Court of Missouri analyzed two arbitration agreements and determined whether the parties were bound to arbitrate pursuant to these

agreements.[1] For example, respondents admit that the court analyzed the scope of the Amway distributorship agreement in holding that respondent Netco was not bound to arbitrate under that agreement. (Opp. 4, 11.) Consequently, the Supreme Court of Missouri divested the arbitrator(s) of responsibility to decide arbitrability issues pursuant to incorporated rules. Indeed, respondents acknowledge (as the court did) that the AAA Rules are incorporated by reference on the face the Pro Net agreement and, similarly, the JAMS Rules are incorporated by reference into the Amway distributorship agreement.[2]

3. Finally, respondents do not contest that this Court has jurisdiction to consider the question presented. Instead, their arguments against certiorari are limited to defending the merits of the decision below and advancing prudential reasons not to grant the petition. These arguments merely reiterate the flawed arguments against the *Nitro* petition. For example, respondents cannot, and do not, dispute the increased use of arbitration agreements in recent years. Likewise, they do not dispute the widespread use of nationwide arbitration providers such as AAA or JAMS. Thus, respondents cannot dispute the broad impact this Court's clarification of *First Options* would have on parties across the country.

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[1] *Nitro* involves the two types of arbitration agreements at issue here as well as a third one, the Transition-to-Pro Net agreement.

[2] The Amway distributorship agreement requires adherence to the Amway Rules of Conduct, which in turn incorporate the JAMS Rules. (Pet. at 4; Pet. App. 74a-75a, 77a.)

CONCLUSION

For the reasons set forth in the petition for certiorari and this reply, the Court should hold this petition pending disposition of the *Nitro* petition, and then grant certiorari, vacate the judgment of the Supreme Court of Missouri, and remand the case for further proceedings consistent with *Nitro*.

Respectfully submitted,

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November 13, 2006